

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

DAVID STALHEIM,

Petitioner,

v.

WHATCOM COUNTY,

Respondent.

Case No. 11-2-0001

COMPLIANCE ORDER

I. PROCEDURAL BACKGROUND

On January 23, 2012 the Board issued a Compliance Order finding Whatcom County ("County") in continuing noncompliance with the Board's August 2, 2011 Final Decision and Order (FDO) on challenged Whatcom County Ordinance 2011-067. The Board's FDO found the County failed to comply with the Growth Management Act (GMA), the State Environmental Policy Act (SEPA), and failed to be guided by GMA Goal 10. The Board also issued a Determination of Invalidity.

In its first Compliance Report filed November 14, 2011, the County did not properly address the requirements of the Board's FDO and the Board again remanded Ordinance 2011-067 to the County for compliance. Whatcom County filed a second Compliance Report on May 3, 2012 and Petitioner subsequently filed Objections to a Finding of Compliance on May 21, 2012.

On June 14, 2012 the Board held a second telephonic compliance hearing. The County was represented by Royce Buckingham. David Stalheim appeared *pro se*. Board Members present were William Roehl and Nina Carter, with Ms. Carter presiding.

II. BURDEN OF PROOF

Following a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenging party to establish the new adoption is clearly erroneous.³

In order to find the County's compliance action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made".⁴ Within the framework of State goals and requirements, the Board must grant deference to local governments in how they plan for growth:

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law . . . Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.⁵

However, where a finding of invalidity has been entered, the burden is on the local jurisdiction to demonstrate the compliance ordinance or resolution adopted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA.⁶

¹ RCW 36.70A.300(3)(b)

² RCW 36.70A.330(1) and (2)

³ RCW 36.70A.320(1), (2) and (3)

⁴ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)

⁵ RCW 36.70A.3201, in part

⁶ RCW 36.70A.320(4)

1 The County thus bears the burden of demonstrating its actions no longer substantially
2 interfere with GMA Goal 10 while the Petitioner has the burden to overcome the
3 presumption of validity of the County's action.
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5 III. DISCUSSION AND ANALYSIS

6 Issue to be Discussed

7 *Whether Whatcom County's compliance action adopting Ordinance 2012-013 responds to*
8 *the Board's August 2, 2011 FDO which found the County violated the Growth Management*
9 *Act, the State Environmental Policy Act, and substantially interfered with GMA Goal 10?*

10 In the original compliance proceeding, Whatcom County presented its newly adopted
11 Resolution No. 2011-037 to cure the problems found by the Board. Petitioner filed
12 Objections to a Finding of Compliance⁷ arguing the County was still not in compliance
13 because it had only adopted a non-binding resolution and administrative policy in regards to
14 the Ordinance, rather than adopting another ordinance to repeal Ordinance 2010-067. In
15 addition, Petitioner argued the County "accepted/approved" four permit extension requests
16 after the Board had issued its FDO, thus showing the County violated the invalidity
17 determination by the Board.
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20 Based on the foregoing, the Board determined Whatcom County failed to meet its burden of
21 proof and continued to be in noncompliance with the GMA as found in the August 2, 2011
22 FDO. The Board ordered Whatcom County to come into compliance by April 23, 2012.
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24 On March 13, 2012 Whatcom County adopted Ordinance 2012-013 repealing Ordinance
25 2010-67, thus enacting an ordinance to repeal an ordinance as required in the County's
26 Charter. In addition, the County explained that the challenged Ordinance itself expired, thus
27 removing the Ordinance from the Whatcom County Code in its entirety. With these two
28 actions, Whatcom County requested a Finding of Compliance from the Board.⁸
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⁷ Petitioner's Objection to a Finding of Compliance, November 26, 2011

⁸ Whatcom County Compliance Report May 3, 2012 at 2

1 Petitioner Stalheim objected to the County's action claiming repeal of the challenged
2 Ordinance by ordinance did not cure the environmental effects of four permits granted under
3 the original, challenged Ordinance 2010-067. By simply repealing the Ordinance, Petitioner
4 argued the County continues to violate the GMA and SEPA, and failed to meet its burden to
5 establish it no longer substantially interferes with GMA Goal 10.⁹ Petitioner claimed the
6 Record shows four permits had been extended under the original Ordinance, but the County
7 had done so without "... environmental review under SEPA."¹⁰ Petitioner was concerned
8 about the continuing environmental effects of those permits and not the technical aspect of
9 repealing the original Ordinance by ordinance. He agreed the original Ordinance had been
10 repealed, but more worrisome were the continuing effects of permits issued under the
11 original, challenged Ordinance. He requested the Board find continuing noncompliance for
12 Whatcom County.
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15 The Board understands Petitioner's concerns and agrees that permits extended from the
16 early 1980s may in fact have detrimental environmental effects. However, the Board does
17 not have jurisdiction over local government permits. Remedies available to the Board do
18 not include the ability to address Petitioner's concerns regarding the continuing potential
19 negative effect of those permits. In this case, the Board has required the County to repeal
20 the offending Ordinance and the County has done so. As for the four continuing permits,
21 the Board can only state that Petitioner might have considered appealing those permits to
22 the hearings examiner or the superior court. Those routes may have provided the remedies
23 Petitioner seeks.
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26 Having said that, the Board is extremely concerned with Whatcom County's apparent
27 flagrant disregard for the goals and principles of the Growth Management Act. In adopting
28 Ordinance 2010-026 and 2011-067 and permitting at least four projects under those
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⁹ Petitioner's Objection to a Finding of Compliance, May 21, 2012 at 3

¹⁰ Ibid. at 5

1 Ordinances, the County allowed decades old development projects to move forward without
2 regard to improvements in our State's environmental and land use laws.

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4 **IV. ORDER**

5 Based on the foregoing, the Board determines Whatcom County Ordinance 2012-013
6 addresses the findings of noncompliance in the Board's August 2, 2011 FDO. The Board
7 finds that the County's challenged provisions now comply with the GMA and the case is
8 CLOSED.
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10 SO ORDERED this 21st day of June, 2012.
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Nina Carter, Board Member

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17 Will Roehl, Board Member
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